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Via E-mail (aszv461@ecy.wa.gov)

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Re: Puget Soundkeeper Alliance's Comments on Preliminary Draft Washington State
Department of Transportation Statewide Stormwater Permit

Dear Annie,

Thank you for the opportunity to provide comments on Ecology's Draft WSDOT Statewide Stormwater Permit. These comments are submitted on behalf of the Puget Soundkeeper Alliance (PSA). We first present some general comments about the permit's approach and timelines, and then organize our comments according to the particular sections of the permit.

General Comments

Permit Approach

PSA is disappointed that the preliminary draft fails to take a more prescriptive approach. In many instances, the permit's requirements are too vague and subjective to be meaningful or enforceable. Unenforceable requirements cannot ensure compliance with AKART or MEP. The permit's approach is made worse by its excessive timelines, which in many instances are entirely devoid of enforceable deadlines. PSA understands the permit's approach reflects Ecology's intention to develop the permit in conjunction with WSDOT's Stormwater Management Program, and that as a result, the permit itself provides only a rough framework and defers to the SWMP for details. This approach might be acceptable to PSA if the SWMP provided anything more than a rough framework itself. Instead, as explained in more detail below, the SWMP contains few, if any, specific, enforceable requirements.

PSA strongly urges Ecology to reexamine its approach to this permit. It is crucial that the permit and SWMP provide objective standards, reasonable and meaningful timelines and deadlines, and enough enforceable detail to ensure compliance with MEP and AKART.

Timelines

Many of the timelines in the permit are too long given the comparable requirements of the 1995 permit and the advance notice provided by this preliminary draft. These include: one year for submission of legal counsel statement of legal authority, when legal authority must be in place on the effective date (and under the 1995 permit) (S5.B.1.c.); 21 days to determine the source of, and 180 days to terminate, an illicit connection (S5.B.2.b.viii); 12 months to establish and begin implementation of intra- and intergovernmental coordination procedures (S5.B.3.b.); four years to map outfalls and geographic areas that do not discharge stormwater to surface water (S5.B.6.b.i., iv.); five years to begin to map tributary conveyances, associated drainage areas, and certain existing connections (S5.B.6.b.ii., iii.); 12 months to adopt and begin enforcement of a policy requiring application of source control BMPs (S5.B.8.a.ii.); and two years to begin annual inspections of permanent stormwater treatment and flow control facilities and to begin to implement a program to annually inspect catchbasins and inlets (S5.B.8.d.). Adding insult to injury, many of these lengthy timelines do not even specify the date by which WSDOT must have completed the task, merely stating that WSDOT must “begin” the task within the given timeframe.

Ecology has recognized that “[s]tormwater is the leading contributor to water quality pollution of urban waterways in Washington,”¹ and the Governor’s Puget Sound Conservation and Recovery Plan (2005-07) prioritizes reducing harm from stormwater runoff. The excessive timelines and lack of enforceable deadlines fail to reflect this urgency, particularly given that this permit will be issued at least six years late.

Incorporation of the 2005 Stormwater Management Manual for Western Washington

In general, PSA is pleased that Ecology would incorporate and thereby prescribe key portions of its stormwater management manual into these permits by reproducing them in the Appendix 1. However, PSA shares the concerns that many have expressed about some of the 2005 modifications made to the Western Washington Manual. In particular, PSA shares the concerns expressed by the U.S. Fish and Wildlife Service and NOAA Fisheries in their joint December 23, 2004, comments on the 2005 manual revisions. Like the Services, PSA questions whether the changes to applicability criteria for the flow control standards (both for highly urbanized drainage basins and to exempt river reaches from flow control), the average annual daily traffic thresholds for advanced treatment, and the limitations on implementation of construction stormwater pollution prevention requirements are adequate in consideration of the needs of threatened and

¹ http://www.ecy.wa.gov/programs/wq/stormwater/municipal/about_stormwater.html (last visited February 9, 2006).

endangered salmonids. PSA further questions whether the Western Washington Manual continues to represent AKART, or MEP, after the 2005 amendment.

Specific Comments on Permit Conditions

Condition S1.B: Scope of Permit

PSA strongly urges Ecology to make WSDOT's stormwater permit applicable throughout the state as originally intended. WSDOT's preference to limit permit coverage to Phase I and Phase II boundaries would significantly undermine efforts to protect and enhance water quality in the Puget Sound.

The geographic boundaries of Phase I and II do not mark the limits of adverse effects from WSDOT's stormwater discharges, which may be especially harmful to Puget Sound resources, as in the case of copper's effects on salmon. It makes little sense, therefore, to limit the permit's coverage to areas within Phase I and II boundaries. Doing so would also be inconsistent with the Puget Sound Conservation and Recovery Plan's emphasis on reducing harm from stormwater. The Puget Sound Action Team seeks to accomplish this goal, in part, by expanding the regulatory program of NPDES stormwater permits and by managing runoff from all state highways. The WSDOT permit should reflect this strategy to increase -- not limit -- the coverage of stormwater permits.

Furthermore, there is no legal justification for limiting the geographic scope of the permit. RCW 90.48.160 requires WSDOT to have a permit to discharge waste into waters of the state, absent an Ecology rule to the contrary. Accordingly, WSDOT must have a permit for its stormwater discharges, including those beyond the Phase I and II boundaries. Additionally, EPA's stormwater regulations require dischargers to have an NPDES permit when it or Ecology determines that such discharges "contribute to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States." 40 C.F.R. § 122.26(a)(v). Ecology's recognition that stormwater is the leading contributor to water quality pollution of urban waterways in Washington represents such a determination. Thus, limiting the permit's coverage to Phase I and II boundaries would do nothing to limit WSDOT's vulnerability to third-party lawsuits.

Limiting the permit to only Phase I and II areas may also diminish WSDOT's ability to obtain funding for maintenance work that is long overdue. If the permit is limited in its geographic scope, the Legislature may not be as motivated to adequately fund these maintenance efforts outside of the covered areas. If WSDOT's permit requires it to accomplish this work throughout the state within a designated time period, in contrast, the Legislature may be more willing to provide adequate funding.

Condition S2: Authorized Discharges

Condition S2.A.3. purports to exempt from permit coverage "stormwater discharges to ground waters of the state that discharge through facilities regulated under the Underground Injection Control (UIC) program." Although the Ninth Circuit Court of

Appeals has not yet reached the question, its district courts have tended to conclude that discharges to groundwater that is “hydrologically connected” to navigable waters are within Clean Water Act (CWA) jurisdiction. Whether or not discharges to groundwater are regulated under the UIC program, the permits would illegally omit them from regulation if such groundwater is hydrologically connected to navigable waters.

Condition S2.A.4. asserts that “discharges to ground waters, not subject to regulation under the federal Clean Water Act, are covered only under state authorities” This appears to be an attempt to take some discharges to groundwater out of the realm of potential citizen suit enforcement when there are permit violations concerning them. PSA emphatically objects to this approach that would limit permittee accountability, as well as the rights of citizens, and provide cover for dischargers who violate the law. As an NPDES permit, all conditions are enforceable via citizen suits. If Ecology wants to have discharges to groundwater regulated only under state waste discharge permit authority, it has to issue a separate permit for that and leave the discharges to groundwater out of the NPDES permits.

Condition S2.B.2. contains a typographical error. The citation should be to 40 C.F.R. § 122.26, not § 1222.26.

Condition S4: Compliance with Standards

The preliminary draft fails to require meaningful compliance with water quality standards. State law mandates that this permit prohibit discharges that cause or contribute to violations of water quality standards, and Ecology should change the permit to comply with these requirements.²

Permit requirements effectively ensuring compliance with water quality standards are very important to PSA and to the public. The inclusion of meaningful requirements to ensure compliance with water quality standards, even if a simple narrative statement prohibiting discharges that cause or contribute to violations of water quality standards, enables concerned citizens to seek redress for serious deleterious impacts of stormwater discharges on a particular waterbody and force improvements in discharge quality and stormwater management. The protection of water quality is, after all, the objective of the National Pollutant Discharge Elimination System and state water quality law. It would be absurd to issue the permit without effective provisions to ensure achievement of this goal.

² RCW 90.48.520 sets a standard for permits: “In no event shall the discharge of toxicants be allowed that would violate any water quality standard, including toxicant standards, sediment criteria, and dilution zone criteria.” State NPDES and general permit regulations require permits, “whenever applicable,” to include “limitations or requirements” necessary to “meet water quality standards.” WAC 173-226-070(3)(a); WAC 173-220-130(1)(b)(i). RCW 90.48.520 admits of no exception and makes compliance with water quality standards “applicable” to these general permits. WAC 173-201A-040(1), -070(1), and -160(3) all also require compliance with water quality standards.

Condition S4.C.1. provides that WSDOT must apply a specified evaluation for transportation-related projects resulting in new stormwater discharges from the effective date of the permit “until the date WSDOT adopts and applies the technical standards in this permit” The permit should specify the date for WSDOT to adopt and apply these standards.

Condition S4.C.1.b. and c. contain typographical errors. They each refer to “the technical standards referenced in S4.B.1”. There is no such section. These sentences appear to refer instead to S4.C.1.

Condition S4.C.1.c. requires WSDOT to “demonstrate that the new stormwater discharge does not cause or contribute to a violation” of water quality and sediment management standards if it elects not to apply the permit’s technical standards. The permit is unclear as to how and when WSDOT is to make this demonstration, and whether and how this information will be made available to the public. The permit should require WSDOT to include such documentation in its annual report.

Condition S4.C.3. provides that WSDOT must apply additional controls if, prior to the construction ad date, site specific information indicates that the technical standards in the permit are not sufficient to protect beneficial uses. First, it is unclear how WSDOT will make that determination, and whether and how it will document its decision to apply necessary additional controls. The permit should be more specific in this regard, and should require WSDOT to include such documentation in its annual report. Second, the decision whether to implement additional controls should not be restricted to the time period before the ad date, as this bears no relation to actual compliance with water quality standards.

Condition S5: Stormwater Management Program

Condition S5.A.2. and S5.A.3. provide that WSDOT’s draft 2005 SWMP is an initial plan for management that is enforceable and that will be revised to comply with the provisions of the permit. Condition S5.A.4. indicates that WSDOT need not accomplish these revisions for one year after the permit becomes effective. Thus, it appears that the permit allows WSDOT’s SWMP to be non-compliant with the provisions of the permit for the first year. Moreover, any revisions to the SWMP would require a permit modification just one year after its issuance, a huge waste of Ecology’s resources. This is clearly unacceptable. Ecology should require WSDOT to submit a final, compliant SWMP by the effective date of the permit. Even if Ecology does not so require, the permit should at least clearly state that WSDOT must fully implement the SWMP and should specify a date by which the SWMP revisions will be completed.

As a general principle, PSA appreciates that the permit incorporates the SWMP and makes its requirements enforceable conditions of the permit. Unfortunately, it appears that the draft SWMP included at Appendix 3 has been written so as to omit any enforceable requirement. PSA therefore strongly prefers that the permit itself prescribe

the content of the SWMP in specific, enforceable terms. Further comments on the draft SWMP at Appendix 3 are included below.

Condition S5.B.2. concerns Illicit Connections and Discharges Detection and Elimination. PSA is disappointed in the preliminary draft's approach to the problem of illicit connections and discharges, which appears to discount the importance of these issues to effective stormwater management. First, the permit allows unreasonable delay in responding to illicit connections. Condition S5.B.2.b.viii. allows WSDOT three weeks (21 days) to initiate an investigation of an illicit connection, and then six months (180 days) to ensure termination of the illicit connection. This response time is totally inadequate when illicit connections could present serious problems. The permit should state that WSDOT must initiate an investigation "as soon as possible and not later than 7 days" after it discovers or receives a report of an illicit connection, and should require WSDOT to remove the confirmed illicit connection within 30 days. Likewise, while the draft provides that WSDOT shall investigate illicit discharges within 7 days "on average," it establishes no timelines for eliminating identified illicit discharges. The permit should set a goal of eliminating all existing illicit connections and discharges by a date certain and preventing, promptly detecting, and timely eliminating future ones.

Second, Condition S5.B.2.b.i. requires WSDOT's illicit connection and discharge detection and elimination program to "include procedures for controlling pollutants entering the MS4 from an interconnected, adjoining MS4." This statement is too vague to provide a meaningful requirement. The permit should articulate appropriate procedures for controlling these pollutants. The same condition purports to specify how WSDOT will identify illicit connections and discharges, including "field screening, inspections, complaints/reports, construction inspections, maintenance inspections, source control inspections, and/or monitoring information, as appropriate." The "and/or" language appears to undermine the requirement to complete the field screening and inspections, and should be replaced with a simple "and".

Third, Condition S5.B.2.b.vii. would allow screening for illicit discharges to be conducted using any of two specified methods or "other alternative methods that have been approved by Ecology." Such other alternative methods and the standards for Ecology approval are not identified. NPDES permits must spell out their conditions so that permittees can comply with them and be held accountable for doing so. In addition, Ecology's post-permit approval of alternative methods would effectively change the permit requirements and should be subject to permit modification procedures.

Condition S5.B.5. concerns runoff from new development, redevelopment, and construction sites. S5.B.5.a. directs WSDOT to "revise, implement, and enforce its Highway Runoff Manual (HRM) to address minimum requirements for stormwater management." PSA strongly prefers that the permit require compliance with the Stormwater Management Manual for Western Washington (in Western Washington), rather than the HRM. If the permit continues to require compliance with HRM instead, it is very important to PSA that the HRM be equivalent to the SMMWW for use in Western Washington, especially with respect to the ADT threshold for metals treatment and the

flow control standard. Accordingly, PSA supports the permit's requirement that the HRM provide "an equal or greater level of protection, for water quality and beneficial uses, as the Stormwater Management Manual for Western Washington."

Condition S5.B.5.a. also provides that WSDOT "shall develop the HRM with opportunities for public review and Ecology must approve the HRM." The permit thus requires WSDOT to comply with a document that does not yet exist and the contents of which are unknown. Although the permit provides that the HRM will be developed with opportunities for public review, it does not state that the revised HRM will be adopted through a permit modification or otherwise provide the necessary opportunity for appeal. Likewise, although the HRM requires Ecology approval, the permit does not specify a deadline for that approval. These gaps must be filled in the next draft.³

Condition S5.B.5.b. allows WSDOT to "apply off-site BMPs for post-construction stormwater management" under certain conditions, including when "on-site treatment is difficult to provide, cumulative effects are of concern, and the project's discharge will not cause or contribute to a violation of water quality standards." PSA is concerned that this condition is too vague. Which types of "off-site BMPs" are allowed? Who determines when on-site treatment is so "difficult to provide" that off-site BMPs are allowed? What is the process for deciding to implement off-site BMPs? The permit should be more specific in these respects.

Condition S5.B.6. concerns mapping and documentation. It allows four to five years for the WSDOT to map, or even merely to begin to map, various components of the MS4. These timelines are outrageous. First, mapping was required under the 1995 permit; thus, the provision of additional time to complete the tasks seems to violate the CWA's antidegradation prohibition. Second, §402(p)(4)(B) of the CWA requires that a municipal stormwater permit "shall provide for compliance as expeditiously as practicable, but in no event later than 3 years after the date of issuance". The preliminary draft's four and five year timelines for mapping therefore violate the CWA in this way as well. Further, the excessive timelines do not meet regulatory requirements for compliance schedules, e.g., compliance dates, milestones, reporting requirements found in state and federal regulations. Finally, since most of the provisions of Condition S5.B.6. contain no end dates, it appears WSDOT can never be held accountable for its failure to complete these tasks.

Condition S5.B.8. concerns operation and maintenance, and S5.B.8.a. addresses operational and structural source control BMPs. PSA generally appreciates that the permit requires WSDOT to apply the source control BMPs identified in the 2005 SMMWW. However, the timelines in this portion of the permit are troubling: 12 months to adopt and begin enforcement of a policy requiring the application of source control BMPs; 18 months to develop and implement SWPPPs; and 24 months to "provide

³ Condition S5.B.5.d. allows WSDOT six months to revise the HRM. As with the SWMP, it seems like a better use of resources to require WSDOT to submit a revised HRM at the outset than to go through a permit modification process only six months after issuing the permit.

training to facilitate proper operation of the source control program.” These timelines are excessive and should be reduced.

Condition S5.B.8.b. addresses stormwater discharges associated with application of pesticides, herbicides, and fertilizers. The provision requires WSDOT’s SWMP to include “vegetation management policies; technical guidelines; procedures; and standards.” PSA would prefer that the permit itself include these elements, and that WSDOT be directed to consider alternatives to toxic pesticides.

Condition S5.B.8.d. provides another good example of the lax approach to timelines, as well as the toothlessness of the permit. Under that condition, WSDOT is allowed two years to begin annual inspections of its permanent stormwater treatment and flow control facilities. But even if it fails to conduct these basic and necessary inspections, it would not violate the permit. Likewise, the Condition allows WSDOT two years (24 months) to begin to implement a program to annually inspect its catchbasins and inlets, but then states that it need not actually inspect these facilities on an annual basis. Both of these provisions are virtually meaningless as written, and clearly fail to meet MEP standards. The permit should require annual inspections, and further, should require that any facility in need of maintenance be made fully functional within 60 days.

There is a typographical error in Condition S5.B.8.c.: the first subsection of that Condition is “iii” but there is no “i” or “ii.”

Condition S5.B.12. pertains to program assessment and evaluation, and requires WSDOT to have a compliance program to insure actions are implemented and facilities constructed and maintained in accordance with the permit and SWMP. PSA notes the draft SWMP included at Appendix 3 is woefully insufficient in this regard, and encourages Ecology to take a much more prescriptive approach to this in its next draft.

Condition S6: Total Maximum Daily Load Allocations

PSA is glad to see that the permit requires WSDOT to comply with existing TMDLs, and that the permit allows for future modification or orders to require compliance with later-approved TMDLs. The language in S6.D. should be strengthened, however, to provide that Ecology “will” -- rather than “may” -- enforce future TMDLs through permit modification or administrative orders.

Condition S7: Monitoring

PSA strongly supports the permit’s requirements for monitoring at outfalls as well as receiving waters, as both are necessary to evaluate the effectiveness of management programs as well as the discharge impacts on water quality. It is very important to PSA that the permit provides for both actual water quality monitoring and BMP effectiveness monitoring. PSA also believes the permit should include very detailed criteria for monitoring programs in the permit. We view this as the best means to get consistent meaningful data to answer the monitoring objective questions.

Condition S7.A.1. directs WSDOT to develop and implement a comprehensive long-term water quality monitoring plan designed to answer to questions about the effectiveness of the program in protecting and restoring water quality and beneficial uses. PSA suggests the monitoring program should also be designed to answer the basic question, “Is WSDOT reducing the discharge of pollutants to the Maximum Extent Practicable?” While the permit assumes that compliance with the permit will meet the MEP requirement, the monitoring program should be utilized to determine whether and where improvements can be made.

Condition S7.A.3. allows WSDOT 12 months to submit a proposed monitoring program and implementation program for review and approval by Ecology. This timeframe is too long, given that WSDOT was required to have such a plan in the 1995 permit and that Ecology is giving WSDOT very advanced notice of the required components of the plan under this permit. The permit should require WSDOT to submit its proposed monitoring plan by the effective date of this permit. Likewise, Condition S7.A.3.e. does not require full implementation of the water quality monitoring program for 24 months after the effective date of the permit. This timeframe is too long and should be reduced.

PSA is pleased that the permit requires WSDOT to monitor for metals, including total and dissolved copper and zinc. As written, however, Condition S7.A.3.c.i.(5). is very unclear, and suggests that such monitoring is not required in all instances. The Condition requires WSDOT’s monitoring program to include the above metals “as necessary, in some high density commercial or industrial urban settings.” This language does not appear to be tailored to WSDOT’s permit. Who determines whether such monitoring is necessary? Why is metals monitoring limited to “some” high density settings, but not others? How will this be determined? Moreover, the language suggests that metals monitoring depends on the surrounding land use, rather than the average daily traffic, which the CalTrans Reports indicate is the most significant factor in highway runoff of copper and zinc. The permit should be explicit that metals be tested in every sample.

In addition, recent reports indicate that polycyclic aromatic hydrocarbons from cars and roads are pollutants of increasing concern for the Puget Sound. PSA urges that PAHs be included among the pollutants for which monitoring is required.

Condition S7.B. states that the “purpose of the monitoring program is to provide a feedback loop for adaptive management of WSDOT’s stormwater management program and Ecology’s municipal stormwater permitting program.” However, the permit does not currently provide for adaptive management. The permit should require additional or alternative action if monitoring indicates high levels of pollutants.

Condition S8: Reporting Requirements

Condition S8.B.1. should require a certified statement as to whether WSDOT is “in compliance” or “not in compliance” with each permit requirement. Where the permit requires WSDOT to begin certain tasks within specified timelines, the permit should require WSDOT to report not only whether it has begun the task, but how far it has progressed, and when it intends to complete the task. Also, where the permit allows or requires WSDOT to take alternative or additional action on the basis of some determination (see, e.g., Conditions S4.C.1.C. and S4.C.3.), the permit should require WSDOT to include in its annual report documentation of its determination and subsequent action.

Appendix 3: Stormwater Management Program Plan

As mentioned above, the draft SWMP fails to provide any enforceable requirements. For example, the SWMP identifies numerous resources from which WSDOT receives “guidance,” but fails to state what the guidance consists of, and even more boggling, fails to require WSDOT to comply with that guidance! In essence, the SWMP merely describes what WSDOT does, but lacks any enforceable language to ensure accountability and compliance.

It is evident that the SWMP contains no internal compliance procedures. This approach falls short of EPA regulations and guidance concerning SWMPs. For example, 40 C.F.R. § 122.34(b) provides the minimum control measures that must be included in a SWMP, including, for example, those for construction site runoff control. The regulations require a SWMP to include the development and implementation of requirements for construction site operators to implement appropriate erosion and sediment control BMPs and procedures for site inspection and enforcement of control measures. 40 C.F.R. § 122.34(b)(4)(ii)(B), (F). Section 3 of WSDOT’s SWMP addresses Construction Stormwater Pollution Prevention. This section indicates that the Highway Runoff Manual “includes guidance for selecting appropriate erosion and sediment control BMPs” but does not state that operators must follow the guidance.⁴ Likewise, this section provides that “WSDOT requires that contractors inspect BMPs” at specified intervals, but does not identify any procedures for enforcement of control measures.

The draft SWMP also falls short of EPA guidance concerning illicit discharges and connections. The EPA recommends that SWMPs include four components: procedures for locating priority areas likely to have illicit discharges; procedures for tracing the source of illicit discharge; procedures for removing the source; and procedures for program evaluation and assessment. 40 C.F.R. § 122.34(b)(3)(iv). The SWMP addresses illicit discharges in Section 2.3.3, but does not specify such procedures. Instead, it merely lists the types of observations field personnel use to identify illicit discharges, and when problems are discovered, the SWMP states only that employees “should” or “are instructed to” take certain actions, or “will seek to” identify the source “where possible”, which “could involve” certain other actions.

⁴ As previously noted, PSA prefers application of the Stormwater Management Manual for Western Washington to the HRM.

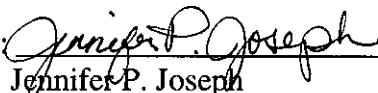
Additionally, the SWMP refers to, but does not incorporate or mandate compliance with, a host of outside documents, which could be changed at any point without permit modification procedures. It also repeatedly identifies measures that "will help evaluate" various programs, but does not provide that WSDOT must actually undertake any of the measures.

The SWMP's language is, in virtually every respect, vague and unenforceable. As indicated above, PSA strongly prefers that the permit itself prescribe the content of the SWMP in specific, enforceable terms. Should the permit continue to defer to the SWMP for detailed requirements of WSDOT's stormwater management program, Ecology should require the SWMP to provide specific, enforceable terms, and to incorporate EPA regulatory requirements and guidance.

Conclusion

PSA appreciates the opportunity to comment on the preliminary draft of the WSDOT Stormwater Permit, and looks forward to reviewing Ecology's changes in the next draft.

Yours truly,
SMITH & LOWNEY, P.L.L.C.

By: 
Jennifer P. Joseph